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Nos. 90-408 and 90-577

In the Supreme Court of the United States

OCTOBER TERM, 1991

COUNTY OF YAKIMA, ET AL., PETITIONERS

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA NATION

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA NATION, CROSS-PETITIONER

v.

COUNTY OF YAKIMA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT/CROSS-PETITIONER

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QUESTIONS PRESENTED

1. Whether Yakima County may impose an ad valorem tax on real property situated within the boundaries of the Yakima Indian Reservation that is owned in fee by the Yakima Nation or individual members of the Yakima Nation.

2. Whether Yakima County may impose a state excise tax on the sale of real property on the Reservation by the Yakima Nation or its members.

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INTEREST OF THE UNITED STATES

Numerous Acts of Congress that advance self-government and economic independence of Indian tribes support the traditional immunity of tribes and their members from state taxation of on-reservation property and activities. At the Court's invitation, the Solicitor General filed a brief at the petition stage supporting adherence to that immunity in this case.

STATEMENT

1. Respondent Yakima Nation occupies a 1.3 million acre Reservation in the State of Washington. The Reservation was established by an 1855 Treaty, ratified in 1859. 12 Stat. 951. Approximately 80% of the Reservation land is held in trust by the United States for the Yakima Nation or its members. The remainder is owned in fee by the Yakima Nation, individual members, or nonmembers. *Brendale* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 415 (1989) (opinion of White, J.); *Washington* v. *Confederated Bands & Tribes of Yakima Nation*, 439 U.S. 463, 469 (1979).[1]

2. This suit was commenced in 1987 by the Yakima Nation against Yakima County and its treasurer. The Yakima Nation sought an injunction barring the County from imposing ad valorem taxes on lands owned in fee by the Nation or its members within the Reservation and from collecting the state excise tax on sales of such lands.[2] The suit was prompted by a scheduled tax sale of approximately 40 parcels in which individual members of the Yakima Nation held a fee interest and for which taxes were past due. See Pet. App. 7a; J.A. 5.

The district court granted summary judgment for the Yakima Nation. Pet. App. 34a-39a. The court relied largely on *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-481 (1976), which held that Montana could not tax personal property of tribal members situated within a reservation, assess a license fee on an Indian conducting a business on the reservation, or tax on-reservation purchases of cigarettes by tribal members.

In *Moe*, Montana argued that application of the taxes and license fees to at least some Indians was authorized

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[1] Approximately 104 members of the Yakima Nation own 139 parcels of fee-patented land. Pet. App. 35a; J.A. 37.

[2] As amicus State of Washington points out (Br. 2), a substantial portion of the property tax and virtually all of the excise tax are paid into the State's general fund for the support of common schools. See Wash. Rev. Code Ann. §§ 82.45.060, 82.45.180 (West 1981 & Supp. 1991), 84.52.065 (West 1991 & Supp. 1991).

by Section 6 of the General Allotment Act of 1887, as amended in 1906, which provides, *inter alia*, that at the expiration of the trust period for allotments, the Indian allottees "shall * * * be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." 25 U.S.C. 349 (reproduced at App., *infra*, 1a).[3] The Court found the State's argument "untenable," explaining that "[i]f the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on 'fee patented' lands, then for *all* jurisdictional purposes—civil and criminal—the Flathead Reservation has been substantially diminished in size." 425 U.S. at 478. That result, the Court reasoned, would create an "impractical pattern of checkerboard jurisdiction" and would conflict with the "existing federal statutory law of Indian jurisdiction." *Ibid.* The Court also reasoned that the State's argument overlooked the Court's more recent conclusions about the General Allotment Act's "present effect"—specifically, that although the Act's ultimate purpose was to allot lands to all Indians and abolish reservations, that policy "was repudiated in 1934 by the Indian Reorganization Act [IRA]."[4] 425 U.S. at 479. The Court noted that there was no decisional authority giving the meaning Montana urged to Section 6 "in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands," and it therefore declined to sustain the state taxes and license fees on that basis. *Ibid.*

In this case, Yakima County relied on a proviso to Section 6 of the General Allotment Act, which states that if the Secretary of the Interior finds that an allottee is able to manage his affairs, the Secretary may issue the allottee a fee patent prior to expiration of the statutory trust period, and "thereafter all restrictions as to sale,

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[3] Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 390, as amended by the Act of May 8, 1906, ch. 2348, 34 Stat. 182.

[4] Act of June 18, 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.*

incumbrance, or taxation of said land shall be removed." Pet. App. 34a. Although that portion of Section 6 was not quoted in *Moe*, the district court found this case to be governed by *Moe*'s conclusions about the present effect of Section 6, in light of the intervening enactment of the IRA and of modern legislation in which Congress "has evinced a clear intent to eschew any such checkerboard approach within an existing reservation.'" Pet. App. 37a-38a (quoting 425 U.S. at 479). The court therefore held that the proviso to Section 6, like the principal clause quoted in *Moe*, did not grant the County jurisdiction to tax fee lands within the Reservation that are owned by the Yakima Nation or its members. Pet. App. 38a-39a.

3. The court of appeals affirmed in part and reversed and remanded in part. Pet. App. 1a-30a. The court acknowledged that a State may not tax Indians on a reservation unless Congress makes its intent to allow such taxation "unmistakably clear." Pet. App. 12a (quoting *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 764 (1985)). But it believed that the proviso to Section 6 of the General Allotment Act satisfied that test. The court acknowledged that *Moe* furnished the "strongest support" for not construing the proviso to authorize taxation of Indian-owned fee lands in the face of more modern legislation—especially since *Moe* declined to follow *Goudy* v. *Meath*, 203 U.S. 146 (1906), which had found state taxation of an allotment to be authorized by the language in Section 6 (quoted above) that provides that allottees "shall be * * * subject" to state laws. Pet. App. 13a, 15a. But the court below chose to confine *Moe*'s holding about the present effect of Section 6 to that clause, and not to apply it to the proviso. Pet. App. 15a-17a. Thus, although the court acknowledged *Moe*'s holding that the policies of the General Allotment Act were repudiated by the IRA and that Section 6 does not permit state taxation of Indian property and activities on Indian-owned fee lands on a reservation, it held that Section 6 permits state taxation of the fee lands themselves. Pet. App. 17a-20a, 26a.

The court of appeals also rejected the contention that the ad valorem tax is barred by 18 U.S.C. 1151, which was enacted in 1948 to codify a modern definition of "Indian country" that includes all lands within an Indian reservation, "notwithstanding the issuance of any patent." The court believed that 18 U.S.C. 1151 defines "Indian country" only for purposes of criminal jurisdiction and is "not * * * relevant to the question of whether fee patented land may be taxed by the state." See Pet. App. 20a-21a; *id.* at 24a-26a.[5]

By contrast, the court of appeals held that the excise tax may not be applied to sales of on-reservation fee lands by the Yakima Nation or its members. The court concluded that the proviso to Section 6 authorizes state taxation only of the land itself, while state law imposes the excise tax on the *sale* of land. Pet. App. 29a-30a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The framework for resolution of cases involving application of state law to matters affecting Indians within a reservation is well established. In many cases—especially those in which a State seeks to apply its laws to *non*-Indians dealing with Indians—the Court conducts a par-

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[5] Although the court of appeals rejected the Tribe's argument that *Moe* forecloses imposition of the ad valorem tax on Indian-owned fee lands on the Reservation, Pet. App. 23a-27a, it did not actually sustain the tax as applied to such lands. The court noted that this Court had since held in *Brendale* that the Yakima Nation may regulate activities on fee lands owned by non-Indians if their impact is "demonstrably serious" and "imperil[s] the political integrity, economic security or the health and welfare of the tribe." *Id.* at 27a (quoting 492 U.S. at 431 (opinion of White, J.)). Although this case is the converse of *Brendale*—inasmuch as it involves an assertion of *state* jurisdiction over fee lands owned by *Indians*—the court believed *Brendale* to be relevant because the Yakima Nation had presented evidence of how the taxation would affect it in a demonstrably serious way. Pet. App. at 27a-28a. The court therefore remanded to the district court with directions to consider that evidence under the standard it drew from *Brendale*. *Id.* at 28a.

ticularized inquiry into the federal, tribal, and state interests at stake. "The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 208, 216 (1987) (quoting *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 334-335 (1983)); see also *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 176-177 (1989).

By contrast, "[i]n the special area of state taxation of Indian tribes and tribal members" on a reservation, the Court has "adopted a *per se* rule" barring such taxation. *Cabazon*, 480 U.S. at 215 n.17. This rule "recognize[s] that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak." *Ibid.* In short, "absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation." *Moe*, 425 U.S. at 475-476 (quoting *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973)). Although Congress may authorize such taxation, "it has not done so often," and it must make its intention to do so "unmistakably clear." *Cabazon*, 480 U.S. at 215 n.17 (quoting *Blackfeet Tribe*, 471 U.S. at 765). Finally, the relevant statutory framework must "be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Blackfeet Tribe*, 471 U.S. at 766.

The Court has applied the foregoing principles in holding that States may not tax the reservation income of Indians (*McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973)), Indian-owned vehicles, mobile homes and other personal property within the reservation (*Moe*, 425 U.S. at 475-476, 480; *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 162-164 (1980); *Bryan* v. *Itasca County*, 426 U.S. 373 (1976)), and on-reservation sales and purchases by tribal

members (*Moe*, 425 U.S. at 475-476, 480; *Colville*, 447 U.S. at 160; *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 111 S. Ct. 905, 911 (1991)). It follows *a fortiori* that, in the absence of an Act of Congress expressly so providing, Yakima County does not have jurisdiction to tax real property owned by the Yakima Nation or its members within the Yakima Reservation.[6] The County concedes as much, and concedes as well that the question must be considered against the backdrop of traditional tribal sovereignty. See Br. 9-10 (citing *McClanahan*, 411 U.S. at 172, and *Williams* v. *Lee*, 358 U.S. 217, 223 (1959)). But the County argues (Br. 11-27) that application of the ad valorem tax is authorized by Section 6 of the General Allotment Act and *Goudy* v. *Meath*, 203 U.S. 146 (1906). This argument is foreclosed by *Moe*, which specifically held that—in light of the intervening enactment of the IRA and modern statutes allocating jurisdiction among the federal government, tribes, and States—Section 6 does not authorize a State to tax reservation Indians who have received fee patents to allotments.

The proviso to Section 6, on which the County principally relies, simply provided for removal of those restrictions on alienation and taxation that were imposed on individual parcels by the General Allotment Act itself, and it did so for the purpose of facilitating the breaking up of reservations, dissolution of tribal relations and tribal governments, and integration of Indians into the non-Indian society. Congress has now repudiated both the allotment policy and the goals it was designed to achieve. In the IRA and subsequent statutes, Congress has preserved reservations (including their fee lands) as Indian country, and has sought to solidify tribal relations, promote tribal self-government and economic devel-

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[6] Cf. *McClanahan*, 411 U.S. at 181 ("the State has no more jurisdiction to reach income generated on reservation lands than to tax the land itself"); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. at 148 (there is "no satisfactory authority for taxing Indian reservation lands").

opment, and establish the reservation as the foundation for tribal affairs. Imposition of the taxes at issue here on land owned by the Yakima Nation or its members would frustrate (and is preempted by) these modern statutes and policies, in the same manner as state taxes on other Indian property and activities on reservations. Those taxes are not saved by a vestigial proviso to the General Allotment Act.

Accordingly, courts or agencies in a number of States have concluded that state taxes may not be imposed on Indian-owned fee lands on a reservation. *Battese* v. *Apache County*, 129 Ariz. 295, 630 P.2d 1027 (1981); N.D. Att'y Gen. Op. No. 85-12, Apr. 11, 1985; *Taxation of Indian Fee Land*, letter from Oregon Dep't of Justice (advice letter dated Mar. 14, 1983); Idaho Tax Comm'n, *Taxation of Lands Within Indian Reservations Which Are Owned By Individual Indians* (June 8, 1982); see also *Estate of Johnson*, 125 Cal. App. 3d 1044, 178 Cal. Rptr. 823 (Dist. App. 1981), cert. denied, 459 U.S. 828 (1982). There is no reason for a different result here.

ARGUMENT

YAKIMA COUNTY MAY NOT TAX LANDS OWNED IN FEE BY THE YAKIMA NATION OR ITS MEMBERS WITHIN THE BOUNDARIES OF THE YAKIMA INDIAN RESERVATION

A. *Moe* v. *Confederated Salish & Kootenai Tribes* Makes Clear That Section 6 Of The General Allotment Act Does Not Authorize State Taxation That Is Otherwise Barred By Federal Law

Yakima County's reliance on Section 6 of the General Allotment Act as authorization to tax real property within the Yakima Reservation that is owned by the Yakima Nation or its members is, we submit, foreclosed by this Court's unanimous decision in *Moe* v. *Confederated Salish & Kootenai Tribes*.

1. In *Moe*, Montana argued that Section 6 authorized it to tax at least some Indian-owned property on the Flat-

head Reservation because it contained some allotted lands that had passed out of trust status. Montana relied on the portion of Section 6, as revised in 1906, which stated that "[a]t the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee * * * then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." Montana pointed out that *Goudy* v. *Meath* had rejected the claim of an Indian patentee that state taxing jurisdiction was not among the "laws to which he and his land had been made subject." 425 U.S. at 477.[7] "Building on *Goudy* and the fact that the General Allotment Act has never been explicitly 'repealed,'" Montana argued "that Congress has never intended to withdraw Montana's taxing jurisdiction, and that such power continues to the present." *Ibid.* Yakima County's argument here is strikingly similar, because it likewise relies (Br. 12-13, 15, 22-24, 26) on *Goudy* and the fact that Section 6 has never been repealed. As in *Moe*, however, the argument is "untenable." 425 U.S. at 478.

The Court held in *Moe* that Section 6 did not authorize taxation of Indians residing on fee-patented lands, in light

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[7] *Goudy* arose under the original version of Section 6, which contained similar language subjecting allottees to state law. The original version had been construed in *In re Heff*, 197 U.S. 488 (1905), to subject allottees to state law when they first received an allotment and trust patent, rather than later, at the expiration of the trust period. In response to *In re Heff*, the relevant portion of Section 6 was amended in 1906 to provide that allottees would not be subject to state law until the trust period expired. S. Rep. No. 1998, 59th Cong., 1st Sess. (1906); 40 Cong. Rec. 3598-3602 (1906). The 1906 amendments also added the proviso to Section 6 that allows the Secretary to issue a fee patent prior to expiration of the trust period.

In re Heff further held that federal laws prohibiting the sale of liquor to Indians were rendered inapplicable when allottees became citizens and subject to state law under Section 6, and it indicated that Congress could not regulate sales of liquor to Indians after that time. This aspect of *In re Heff* was overruled in *United States* v. *Nice*, 241 U.S. 591 (1916).

of the "federal statutory law of Indian jurisdiction" that eschews such a checkerboard regime of state authority over Indians, 425 U.S. at 478 (citing *Seymour* v. *Superintendent*, 368 U.S. 351, 358 (1962)), and the IRA's repudiation of both the allotment policy and its goals of abolishing reservations and assimilating Indians into the non-Indian community, 425 U.S. at 478-479 (quoting *Mattz* v. *Arnett*, 412 U.S. 481, 496 & n.18 (1973)). The Court observed that the State had referred it to no decisional authority—and that it knew of none—giving the meaning the State urged for Section 6 "in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands," such as Public Law 280.[8] See 425 U.S. at 478-479. Thus, *Moe* squarely rejected the contention that the principal clause of Section 6 of the General Allotment Act, and the construction of that clause in *Goudy*, have the present effect of permitting state taxation of matters occurring (or Indians living) on Indian-owned fee lands within a reservation. Because *Goudy*, like this case, involved imposition of Washington's property tax to the Indian-owned fee land itself, *Moe*'s refusal to give Section 6 the meaning Montana urged in reliance on *Goudy* forecloses Yakima County's attempt to impose the state property tax on Indian-owned fee lands on the Yakima Reservation by invoking the language in the principal clause of Section 6 that subjects an allottee to all state "laws" upon expiration of the statutory trust period.[9]

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[8] Pub. L. No. 83-280, 67 Stat. 588, as amended, 18 U.S.C. 1162, 25 U.S.C. 1321-1326, and 28 U.S.C. 1360.

[9] The County errs in attempting to justify its reliance on *Goudy* and the principal clause portion of Section 6 by arguing (Br. 22-23) that *Moe* does not really stand for the propositions described in the text. It asserts that *Moe* addressed only the question whether Section 6 authorizes taxation of *all* Indians residing on a reservation where a considerable amount of land had been patented in fee, and that Montana did not distinguish for these purposes between Indians residing on fee lands and those residing on trust lands. See also Montana, *et al.* Amici

2. Yakima County seeks to avoid the holding in *Moe*—and to tax the (Indian-owned) fee lands themselves—by relying on the first proviso to Section 6, which was not specifically discussed in *Moe*. The proviso allows the Secretary to issue a fee patent prior to the time when the trust period otherwise would expire (and when the allottee would otherwise become subject to state law under the principal clause of Section 6) if he finds that the allottee is able to manage his own affairs; it then states that "thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed." The County argues (Br. 13, 22-24 & n.11) that because the proviso was not quoted in *Moe*, it may be given effect here to authorize state taxation of Indian-owned fee lands on the Yakima Reservation. Contrary to that contention, how-

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Br. 22-23; Nat'l Ass'n of Counties Amicus Br. 13. As we have explained in the text, this Court addressed Section 6's application specifically to fee lands. 425 U.S. at 478-479. Similarly, the district court in *Moe* specifically considered and rejected the contention that, by virtue of the language in Section 6 subjecting fee patentees to state laws, those "Tribal members who received fee patents under the terms of the General Allotment Act of 1887 and who continue to reside on the Reservation are subject to all of the tax laws of the State of Montana." *Confederated Salish & Kootenai Tribes* v. *Moe*, 392 F. Supp. 1297, 1316 & n.15 (D. Mont. 1975) (three-judge court); compare *id.* at 1319 n.3 (Smith, J., dissenting on this issue). Montana did argue on appeal that it could impose the taxes in question on all Indians on the reservation; but relying on *Goudy* and the language of Section 6 quoted above, it also challenged the district court's holding "that not even those individual Indians receiving fee patents under the General Allotment Act are subject to the jurisdiction of the State." 74-1656 & 75-50 Appellants'/Cross Appellees' Br. 16-17; see generally *id.* at 14-17; Reply Br. 4-5; 74-1656 J.S. 11-12. And the State of Washington, in its reply brief as amicus curiae in *Moe* (at 5), likewise relied on Section 6 in arguing that upon expiration of the trust period, Indians came under the authority of the State, including the "taxing jurisdiction * * * established by *Goudy* v. *Meath*." Thus, *Moe* squarely considered and rejected the contention that the principal clause of Seciton 6 and *Goudy* permit state taxation of Indians based on the fee status of reservation lands.

ever, the reasoning of *Moe* applies to *all* of Section 6, including its proviso. Indeed, one would expect invalidity of the ad valorem tax on real property to follow *a fortiori* from *Moe*, because the immunity of Indian *lands* from state taxation and control is at the very core of federal Indian policy. See *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1985); 25 U.S.C. 177. Yet the County not only claims the right to tax such lands, even though it concededly cannot impose any *other* taxes on reservation Indians; the County also claims the right to dispossess the Indians of their fee lands through tax sales, as it planned to do with respect to a number of parcels when this suit was filed. The proviso to Section 6 does not support so extraordinary and anomalous a result.

In the first place, if the principal clause of Section 6 is insufficient, in light of subsequent Acts of Congress, to authorize state taxation of Indian property and transactions within a reservation's boundaries (as the Court held in *Moe*), a mere proviso to that clause likewise must be insufficient as well. Cf. *United States* v. *Morrow*, 266 U.S. 531, 534-535 (1925) (a proviso is presumed to be confined to the subject matter of the principal clause). That construction is reinforced by the limited purpose of the proviso: to accelerate the date on which land passed out of trust status, if the allottee was prepared to receive a fee patent prior to the time (referred to in the principal clause of Section 6) when the trust period otherwise would expire. There is nothing in Section 6, in subsequent Acts of Congress, or in common sense, to suggest that parcels that passed into fee status more quickly pursuant to the proviso should be treated differently from other reservation fee lands for purposes of the *current* statutory framework governing jurisdiction over Indian reservations that the Court found controlling in *Moe*. To the contrary, the result would be a variant of the "checkerboard" pattern of state taxing jurisdiction the Court rejected in *Moe*: some Indian-owned fee lands on the Reservation would be subject to taxation by

the State while others would not, and the difference would turn on decades-old transactions that have no relevance to current Indian policy.[10]

Moreover, it is only the principal clause of Section 6, which was invoked in *Goudy* but found insufficient in *Moe*, that in terms affirmatively makes state law applicable: it provides that the allottee "shall * * * be subject to" state law when a fee patent is issued at the expiration of the trust period. By contrast, the proviso states only that all "restrictions" on sale, incumbrance and taxation shall be "removed" when a fee patent is issued at an earlier time. The restrictions referred to obviously are those imposed on a parcel-by-parcel basis by the General Allotment Act itself, which, by specifying that an allotment was to be held in "trust" (§ 5, 25 U.S.C. 348), pro-

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[10] In this case, the record does not show which (if any) of the parcels owned in fee by the Yakima Nation or individual members originally passed into fee status pursuant to the proviso, rather than at the expiration of the trust period, as contemplated by the principal clause of Section 6 (which under *Moe* does not authorize state taxation of Indian property). There also are a number of other statutes under which trust lands might have passed into fee status, statutes that do not contain the necessary express authorization of state taxation if the fee land is owned by Indians. For example, on many reservations, surplus lands not needed for allotment were opened for settlement by non-Indians. See, *e.g.*, *Solem* v. *Bartlett*, 465 U.S. 463, 466-467 (1984). If a tribe or its members has repurchased any such lands within the reservation, they would not be subject to state taxation in the absence of a specific authorization by Congress. There is no such authorization in the surplus land Act applicable to the Yakima reservation. See Act of Dec. 21, 1904, ch. 22, 33 Stat. 595. There likewise is no such authorization in the statutes permitting the Secretary to: issue fee patents to the heirs of a deceased allottee (25 U.S.C. 372), partition allotments and issue fee patents to heirs (25 U.S.C. 379), or sell allotments upon the petition of an allottee or his heirs or on behalf of an incompetent Indian (25 U.S.C. 404, 405). This complex web of statutory provisions governing Indian lands further demonstrates the anomalies and checkerboard pattern of taxing jurisdiction inherent in the County's reliance on a vestigial provision of the General Allotment Act that happens to refer to the removal of restrictions on "taxation."

tected the individual allottee by protecting his or her property from alienation, incumbrance and taxation pursuant to state law. See *United States* v. *Mitchell*, 445 U.S. 535, 543-544 (1980). The removal of those "restrictions" imposed by the General Allotment Act does not remove *other* barriers to state taxation; in particular, it does not override the general principles of preemption, confirmed by more modern legislation and decisions of this Court, that bar extension of state laws (especially state tax laws) to Indians and their property within a reservation. See pages 6-7, *supra*.[11]

Put another way, the proviso's removal of the General Allotment Act's "restrictions" permits taxes to be imposed by any government that otherwise has jurisdiction to do so. Thus, if the land is situated outside the Yakima Reservation, Yakima County and the State of Washington may impose whatever taxes state and federal law allow, even if the land is owned by an Indian.[12] But the proviso obviously does not, for example, confer jurisdiction on King County or the State of Oregon, as a matter of either state or federal law, to tax fee lands in Yakima County. Similarly here, if the land is located within the Yakima Reservation and is owned by the Yakima Nation or one of its members, the land remains, as a matter of

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[11] Because the vast majority of fee patents issued pursuant to the proviso to Section 6 no doubt *preceded* the statutes and judicial decisions upon which the Court relied in *Moe* in holding that the principal clause of Section 6 does not authorize state taxation of Indian property on a reservation, the "restrictions" imposed by those statutes and decisions could not have been "removed" by issuance of a fee patent pursuant to that proviso.

[12] The County therefore errs in characterizing the argument against state taxation to be that the proviso to Section 6 has been "repealed," and in arguing that repeals by implication are disfavored. See Br. 16, 24 (citing *Morton* v. *Mancari*, 417 U.S. 535 (1974)). No repeal is involved here, by implication or otherwise. The 1906 proviso to Section 6 remains in force, and any lands for which fee patents issued remain in fee status (absent reacquisition in trust). If that land is outside an Indian reservation, or held by a non-Indian, it may still be taxed pursuant to the proviso.

federal law, beyond the taxing jurisdiction of the State and its political subdivisions. Instead, within the Reservation, Section 6's removal of the General Allotment Act's restrictions on taxation of allotments has the effect of permitting a property tax to be levied by the *Tribe*, which has inherent jurisdiction, protected by federal law, over its own lands and affairs, as well as those of its members. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982).[13]

B. The History Of Federal Statutory Policy Regarding Tribal Sovereignty, Economic Independence, And Indian Reservations Confirms That Section 6 Does Not Authorize State Taxation Of Indian-Owned Reservation Lands

For the reasons explained in point A, *Moe* controls this case and requires rejection of the County's efforts to tax Indian-owned land on the Yakima Reservation. If there could be any doubt, however, it is erased by the history of the Indian policies to which the Court referred in *Moe*.

1. "The policy of leaving Indians free from State jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789 (1945). The policy is embodied in the Constitution, which grants Congress alone the power "To regulate Commerce * * * with the Indian Tribes." Art. I, § 8, Cl. 3. This Clause represents a deliberate repudiation by the Framers of the ambiguous and divided authority over Indian affairs that existed under Article IX of the Articles of Confederation, which granted Congress "the sole and exclusive right and

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[13] The proviso on which the County relies does not, of course, even mention States. Accordingly, even on its own terms, it does not imply that a State must have taxing jurisdiction when the General Allotment Act's restrictions are lifted. On the other hand, allotted lands (and income derived from them) do become subject to *federal* taxes when they are no longer in trust status, even if they are within a reservation. *Squire* v. *Capoeman*, 351 U.S. 1, 7-8 (1956).

power of regulating * * * the trade and managing all affairs with the Indians," but preserved "the legislative right of any State within its own limts." See *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 18-19 (1831); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 558-561 (1932); *The Federalist* No. 42, at 294 (J. Madison) (J. Cooke ed. 1961). So too, the Constitution confers on the President, with the advice and consent of the Senate, the power to make treaties (Art. II, § 2, Cl. 2), and "by declaring treaties already made, as well as those to be made, to be the supreme law of the land, * * * admits [the Indian nations'] rank among those powers who are capable of making treaties." *Worcester*, 31 U.S. (6 Pet.) at 559. Against this background, the Court held in *Worcester* that "[t]he Cherokee nation * * * is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force." *Id.* at 561.

Although *Worcester* concerned state criminal jurisdiction over Indian lands, "the rationale of the case plainly extended to state taxation within the reservation as well." *McClanahan*, 411 U.S. at 169. Indeed, exemption from taxation has long epitomized the distinct character of the Indian tribes within their own territory. This principle, too, is embodied in the Constitution, which excludes "Indians not taxed" from the enumeration upon which apportionment of Representatives and direct taxes is based. Art. I, § 2, Cl. 3; Amend. XIV. Accordingly, in *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867), the Court held that Indian lands held in severalty or in common were exempt from state taxation. The Court explained that "[i]f the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' * * * separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union." *Id.* at 755; see also *id.*

at 756-757, 758-759.[14] The Court likewise invalidated state taxes on reservation land owned by a tribe in fee in *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867), terming the taxes and related provisions "extraordinary" and "an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations." *Id.* at 766, 770, 771. "[T]his Court has never wavered from the views expressed in these cases," where essential tribal relations have remained intact on a reservation. *Blackfeet Tribe*, 471 U.S. at 765.[15]

2. With the enactment of the General Allotment Act in 1887, a "new policy" for a time "found expression in the legislation of Congress—a policy which look[ed] to the breaking up of tribal relations," "put[ting] an end to tribal organization" and to "dealings with Indians * * * as tribes," abolishing reservations, and "establishing of the separate Indians in individual homes." *United States* v. *Celestine*, 215 U.S. 278, 290 (1909). Allotments were held in trust to prepare individual Indians for assimilation and self-sufficiency, and they accordingly were exempt from state taxation as instrumentalities of the United States during this step toward accomplishing the ultimate goals of the General Allotment Act. See *United States* v. *Rickert*, 188 U.S. 432, 437 (1903). Passage of an allotment from trust into fee status was another such step, with the intended consequence of both subjecting the individual Indian to state tax and other laws and further attenuating his tribal relations.

3. Congress once again changed course dramatically in the middle third of this Century. Enactment of the

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[14] Although the parcels held in severalty could not be alienated without the approval of the Secretary of the Interior (72 U.S. (5 Wall.) at 753), the Court did not rely on that fact in finding the lands immune from state taxation.

[15] By contrast, the doctrine of Indian sovereignty "has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community." *McClanahan*, 411 U.S. at 171.

IRA in 1934 "repudiated" the policies of the General Allotment Act, which had caused much reservation land to pass out of trust status. *Moe*, 425 U.S. at 479 (quoting *Mattz*, 412 U.S. at 496); see F. Cohen, *Handbook of Federal Indian Law* 216 (1942). Section 1 of the IRA prohibited further allotments; Section 2 extended indefinitely the trust period of existing allotments; and Section 3 provided for restoration of surplus lands on reservations to tribal ownership. 25 U.S.C. 461, 462 and 463. But the IRA did much more. It also sought to reinvigorate tribal relations, enhance the authority of the tribes within their reservations, restore the national policy of dealing with the Indians as tribes, "rehabilitate the Indian's economic life," and "give the Indians the control of their own affairs and of their own property." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. at 152 (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934), and 78 Cong. Rec. 11,125 (1934) (Sen. Wheeler)).

The most relevant effect of the IRA for present purposes was to reinstate the basis for the broad immunity from state taxation that *The Kansas Indians* and *The New York Indians* had recognized for Indian lands within a reservation. The justification for the limited restriction on state taxation afforded trust allotments under the General Allotment Act had been the supposed incompetence of the allottee; and the premise for removing that restriction had been that the individual Indian was prepared for assimilation and the severing of his tribal relations—*i.e.*, that the purpose of the federal instrumentality created by the General Allotment Act was accomplished. The removal of that narrow restriction applicable to individual parcels does not speak at all to the distinct immunity of the tribal community from state taxation, which has been consistently recognized by this Court, from *The Kansas Indians*, through *McClanahan*, *Moe*, *Itasca County*, *Colville*, and *Blackfeet Tribe*. The latter immunity not only shields the individual Indian; it also respects and promotes the sovereignty and economic independence of the tribe. The Court made this

very point in *Moe* when it explained why the Tribe had standing to sue, noting that 'the substantive interest which Congress has sought to protect is tribal self-government," which exists "apart from the monetary injury asserted by the individual Indian[s]." 425 U.S. at 469 n.7. And the Court specifically noted in *Moe* that the basis for the tax immunity it recognized was not the federal instrumentality doctrine, on which *Rickert* (and the General Allotment Act) rested, but "that which *McClanahan* identified, *i.e.*, that state taxing jurisdiction has been pre-empted by the applicable treaties and federal legislation." 425 U.S. at 474 n.13.

4. At the time of the General Allotment Act and the IRA, and up to 1948, there was no statutory definition of the term "Indian country," which identifies the territory in which matters affecting Indians are under the exclusive jurisdiction of the tribes and the United States, to the exclusion of the States.[16] During that period, "Indian country" was generally thought to include only land owned by Indians, usually with the title held in trust by the United States. When Indian ownership ended, the land was no longer part of Indian country. *Bates* v. *Clark*, 95 U.S. 204, 209 (1877); *Celestine*, 215 U.S. at 285; *Solem* v. *Bartlett*, 465 U.S. 463, 468 (1984). In 1948, Congress enacted a statutory definition of "Indian country" in 18 U.S.C. 1151[17] that for the first time defined it to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent.*" 18 U.S.C. 1151(a) (emphasis added). The Court described the effect of this enactment in *Solem* v. *Bartlett*, 465 U.S. at 468:

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[16] The term "Indian country" had last been defined in Section 1 of the Trade and Intercourse Act of June 30, 1834, ch. 161, 4 Stat. 729. That provision, however, was not included in the Revised Statutes and was therefore repealed. *Donnelly* v. *United States*, 228 U.S. 243, 268 (1913).

[17] Act of June 25, 1948, ch. 645, 62 Stat. 757.

> The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. * * * Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries.

This expansion of "Indian country" makes clear that Indians enjoy self-government, free from state control, on all land (both fee and trust) within their reservations. It therefore establishes a firm statutory basis for applying the rule of immunity of *The Kansas Indians* and its progeny to fee lands owned by Indian tribes and their members within an existing reservation.

The court of appeals believed—and the County concurs (Br. 34-35)—that Section 1151 applies only to criminal cases and "is not * * * relevant to the question of whether fee patented land may be taxed by the state." Pet. App. 20a-21a. That plainly is not the law. "While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n.2 (1975) (citing *McClanahan*, 411 U.S. at 177-178 n.17; *Kennerly* v. *District Court*, 400 U.S. 423, 424 n.1 (1971); and *Williams* v. *Lee*, 358 U.S. at 220-222 & nn. 5, 6, 10); accord, *Cabazon*, 480 U.S. at 207 n.5.[18] Indeed, in this respect as well, the County's position cannot be reconciled with *Moe*. There, in holding that the State could not tax Indians on fee land, the Court relied on its conclusion in *Seymour* v. *Superintendent* that a checkerboard pattern of criminal jurisdiction, turning on the ownership of parcels of land within a reservation, was "contrary to the intent embodied in the existing federal statutory law of

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[18] The definition of "Indian country" in Section 1151 also governs the allocation of civil adjudicatory jurisdiction under Public Law 280. See 28 U.S.C. 1360. As a result, it would be virtually impossible for a State to enforce its tax laws against land owned by an Indian within a reservation unless it acquired civil jurisdiction pursuant to Public Law 280. See *Kennerly* v. *District Court*, 400 U.S. at 426-427.

Indian jurisdiction." 425 U.S. at 478. At the cited page in *Seymour*, the Court in turn relied on what it termed "the plain language of § 1151," in which "Congress specifically sought to avoid" such confusion. 368 U.S. at 358.

The change wrought by the enactment of Section 1151 was perhaps most marked, at least initially, in the area of criminal law. Thus, prior to 1948, it was generally understood that the States had criminal jurisdiction over Indians on fee lands within an Indian reservation. See, *e.g.*, *State* v. *Big Sheep*, 75 Mont. 219, 230-233, 243 P. 1067, 1071 (1926);[19] *State* v. *Johnson*, 212 Wis. 301, 307-312, 249 N.W. 284, 287-288 (1933); *State* v. *Bush*, 145 Minn. 413, 418-419, 263 N.W. 300, 303 (Minn. 1935).[20] Indeed, Section 6 of the General Allotment Act itself provided for application of state law, both criminal and civil, to Indians who received patents in fee at the expiration of the trust period. After enactment of 18 U.S.C. 1151(a), those prior judicial rulings and Section 6 were no longer effective to confer criminal jurisdiction. This led to the situation described in *Solem*, 465 U.S. at 467, in which the allocation of criminal jurisdiction turns on reservation boundaries, not the fee or trust status of land, even though that result plainly was not envisioned when the General Allotment Act was passed in 1887 and amended in 1906. The situation regarding taxing and other civil jurisdiction, at issue here, is the same.

5. As this Court has recognized, since the enactment of the IRA, Congress has enacted numerous other stat-

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[19] See 75 Mont. at 234, 293 P. at 1071:

> Lands to which the United States has parted with title, and over which it no longer exercises control, even if within the exterior boundaries of the reservation, are not deemed a part of the reservation. All other lands within the reservation boundaries are.

[20] This Court's decision in *United States* v. *Ramsey*, 271 U.S. 467 (1926), confirms as much. It held that land allotted in fee to an Indian on a reservation, but subject to restrictions on alienation, was "Indian country" because of the restrictions. There would have been no significant issue worthy of this Court's review if the land in *Ramsey* had not been restricted.

utes designed to strengthen tribal self-government and economic independence on reservations set apart from state jurisdiction.[21] As the Court pointed out in *Cabazon*, these substantial federal interests were reaffirmed by President Reagan's 1983 Statement on Indian Policy, which stressed "that tribes [must] reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government." 480 U.S. at 217 & n.20 (quoting 19 Weekly Comp. Pres. Doc. 98, 99 (1983)); see also *Kerr-McGee Corp.* v. *Navajo Tribe*, 471 U.S. 195, 201 (1985). More recently, President Bush issued a similar statement reaffirming the government-to-government relationship between the United States and Indian tribes (which he described as the "cornerstone" of "the administration's policy of fostering tribal self-government and self-determination") and endorsing tribal administration of programs pursuant to the Self-Determination Act. 27 Weekly Comp. Pres. Doc. 784 (June 14, 1991). These important federal policies, which have been recognized by all three Branches of the Federal Government, fully support the traditional immunity of lands (and other property) owned by an In-

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[21] See, *e.g.*, *Blackfeet Tribe*, 471 U.S. at 767 n.5 (Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a *et seq.*, which does not subject tribal royalties to the pre-IRA authorization of state taxes in 25 U.S.C. 398); *Cabazon*, 480 U.S. at 216 n.19, 217-218, and *Itasca County*, 426 U.S. at 389 n.14 (both citing the Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act, 25 U.S.C. *et seq.*); *McClanahan*, 411 U.S. at 176-177 (citing Buck Act's protection against state taxes (4 U.S.C. 109) and requirement of tribal consent for assumptions of jurisdiction by a State under Public Law 280 (see 25 U.S.C. 1322(a)); *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 44-45, 49, 52 (1989) (Indian Child Welfare Act of 1978, 25 U.S.C. 1901-1963). See also 25 U.S.C. 2701 *et seq.* (Indian Gaming Regulatory Act); 26 U.S.C. 7871 (Indian Tribal Governmental Tax Status Act, discussed in S. Rep. No. 646, 97th Cong., 2d Sess. 11 (1982)); Indian Mineral Development Act of 1982, 25 U.S.C. 2101 *et seq.*, discussed in H.R. Rep. No. 746, 97th Cong., 2d Sess. 3-5, 8, 10-11 (1982)); S. Rep. No. 274, 100th Cong., 1st Sess. 4 (1987) (discussing 1988 amendments to Indian Self-Determination and Education Assistance Act, Pub. L. No. 100-472, § 201, 102 Stat. 2288).

dian tribe and its members within their reservation—the fulcrum for achieving the "overriding goal" of "tribal self-sufficiency and economic development." *Cabazon*, 480 U.S. at 216.

In sum, Yakima County's narrow focus on the fact that some fee lands on the Yakima Reservation were once allotted to individual Indians, and then passed into fee status pursuant to the proviso to Section 6 of the General Allotment Act, ignores the "significant geographic component" of tribal sovereignty that now undergirds preemption analysis in this area. *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 151 (1980); compare *McClanahan*, 411 U.S. at 170-171, with *Mescalero Apache Tribe* v. *Jones*, 411 U.S. at 148-150. For, as this Court recently reaffirmed in *Duro* v. *Reina*, 110 S. Ct. 2053, 2060 (1990) —citing *Moe*—state taxation of tribal members on the reservation "would interfere with internal governance and self-determination."

6. The County cites several federal statutes which, in its view, nevertheless indicate that States may tax reservation land held in fee by Indians. For example, the County notes (Br. 14-15) that Section 5 of the IRA, 25 U.S.C. 465, permits the Secretary of the Interior to take land in trust for Indians, both on and off a reservation, and that the land then is free from taxation; from this the County infers that land on a reservation that is owned in fee by an Indian must be subject to state taxes. That inference is a *non sequitur*. The trust status of the land concededly is important as a bar to state taxation of land outside the boundaries of a reservation, and the wording of Section 5 may be explained on that ground alone. Furthermore, although the IRA was an important step in the re-invigoration of reservations and tribes, it did not expand the concept of Indian country to include all land within the boundaries of a reservation; that expansion did not occur until 18 U.S.C. 1151 was enacted in 1948. It therefore is understandable that Congress might have thought it advisable in 1934 to provide for the taking of *all* land in trust (and expressly to exempt it from state taxation) both inside and outside the res-

ervation. Moreover, the Secretary has since promulgated regulations governing the taking of land in trust for Indians, 25 C.F.R. Pt. 151, and one of the factors to be considered is "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls." 25 C.F.R. 151.10(e). Contrary to the County's suggestion (Br. 20-21), the preamble makes it clear that the focus of this provision was on land *outside* of a reservation. See 45 Fed. Reg. 62,034, 62,035 (1980).[22]

The County also relies (Br. 17-18) on a special statute authorizing land transactions affecting Yakima land. 25 U.S.C. 608 (1988). That statute, however, supports our position, not the County's. As amended in 1964, it provided for acquisition of land for the Yakima Nation both within the Reservation and within the far larger area ceded by the Yakimas to the United States under the Treaty of June 9, 1855. See J.A. 24 (map). As amended in 1964, Section 608(c) provided that when land that is not in trust status is purchased for the tribes, title must be taken in fee and the land "shall not, by reason of its being owned by the tribes, be exempt from taxation in accordance with the laws of the State of Washington."[23] Pub. L. No. 88-540, § 1, 78 Stat. 747. That assurance presumably was especially important because of the potential for purchases within a vast ceded area outside the Reservation. Moreover, as applied to fee land inside the Reservation, the presence of the express provision that land so acquired shall not be exempt from state taxation

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[22] The preamble states (45 Fed. Reg. at 62,035) (emphasis added):

> Many objections were received about the acquisition of fee lands in trust status. These comments primarily concerned the erosion of tax base and the serious jurisdictional problems that can arise *when land outside of reservation* is acquired in trust status.

[23] As the County points out (Br. 18), 25 U.S.C. 608 was amended in 1988 and 1990 to provide that all land purchased for the Yakima Nation must be taken in trust. Pub. L. No. 100-581, § 213, 102 Stat. 2941; Pub. L. No. 101-301, § 1(a), 104 Stat. 206.

by virtue of tribal ownership implies that the land *would* be exempt from taxation in the absence of that provision. The County's claim in this case, of course, is based, not on any alleged acquisitions of lands under this special statute, but on Section 6 of the General Allotment Act.

7. Finally, the County and certain of its amici rely on statements in various government sources to the effect that, by virtue of the principal clause of Section 6 of the General Allotment Act, allotments were exempt from state taxation during the trust period or that States could tax Indian-owned fee land when the trust period expired. Most of those statements, however, do not distinguish between on- and off-reservation lands, and most predated (or concern events that predated) the IRA, the 1948 expansion of "Indian country" to include all land within the boundaries of a reservation, and other modern statutes affecting Indians. See, *e.g.*, Pet. Br. 19; LaPlata County, *et al.* Br. 3-26. They accordingly add nothing to the text of Section 6 itself, which subjected allottees to state laws and removes the restrictions on taxation imposed by the General Allotment Act when a fee patent issued. They therefore are irrelevant to the distinct question, resolved in *Moe*, concerning the *present* effect of Section 6 on Indian reservations, in light of the more recent enactments that reinstate the premises for the traditional immunity of Indian property from state taxation.[24]

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[24] The State of Washington cites (Br. 9-11) three opinions issued by Solicitor Margold in 1934, immediately after enactment of the IRA. The first stated that the IRA did not divest the Secretary of his authority to issue fee patents to allottees and therefore has no relevance to the tax question. 1 Op. Sol. of Inter. 426 (1934). The second indicated that property owned by a tribal corporation organized under Section 17 of the IRA might be *immune* from state taxation; it therefore obviously does not support the County here. 1 Op. Sol. of Inter. 491. The third opinion simply raised (but did not resolve) policy questions about taking land in trust pursuant to Section 5 of the IRA, inquiring whether it was the purpose of the Indian Office to eliminate state taxation of all Indian lands that were then taxable. 1 Op. Sol. of Inter. 503, 504. Solicitor Margold did not identify what property he believed *was* taxable at that time or distinguish between on- and off-reservation property. Moreover, these prelimi-

The County places considerable reliance (Br. 19-20) on *Squire* v. *Capoeman*, 351 U.S. 1 (1956), which held that the federal capital gains tax does not apply to proceeds from the harvesting of timber on allotments. The IRS had contended that it could tax income generated by trust allotments issued under the general Allotment Act, claiming that the implication of the proviso to Section 6 that taxes may not be assessed until a fee patent issued referred to state and local, not federal, taxation. The Court rejected this view, and found a congressional intent "to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee." 351 U.S. at 8.[25] That passage, however, has little to do with this case. As an historical matter, the substance of the government's position in *Squire* v. *Capoeman* was correct. As we have explained, at the turn of the Century, Congress considered "Indian country" to coincide with land held in trust or under restrictions against alienation; and when the trust or restricted status terminated, the land would be taxable by the States. The intent of Congress in 1906 therefore certainly was focused on state and local taxation. That intent, however, could not anticipate, much less override, the enactment of the IRA, 18 U.S.C. 1151, and other modern statutes affecting Indians.[26]

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nary thoughts in the unsettled period immediately following enactment of the IRA occurred well before the codification of the expanded definition of "Indian country" in 1948, which placed in statutory form the preemptive principles on which the Court relied in *Moe*. In any event, the Court has not hesitated to find immunity from state taxing or other jurisdiction despite contrary administrative interpretations or judicial practices. See, *e.g.*, *Blackfeet Tribe*, 471 U.S. at 768 n.7; *Fisher* v. *District Court*, 424 U.S. 382, 390 (1976).

[25] The county ignores the word "only" in the quoted passage. That word is crucial, because it indicates that issuance of a fee patent is a necessary condition for state taxation, but does not suggest that it is a *sufficient* condition—especially where, as here, there are independent federal-law barriers.

[26] The lumbering and taxation at issue in *Capoeman* occurred in 1943, before the definition of Indian country was expanded by 18

The County likewise relies (Br. 20) on *United States* v. *Mitchell*, 445 U.S. 535 (1980), where the government and the Court agreed that the purpose of holding allotments in trust for Indians under the General Allotment Act was to afford an immunity from state taxation during the trust period. This statement is plainly correct, and the fact that, under modern legislation, immunity from state taxation is *also* found where Indian property is within a reservation, does not alter that purpose. The government's position in *Mitchell* therefore has no bearing on the present case.

8. Although the County and its *amici* assert that the effects of affirming the immunity of Indian-owned land on a reservation from state taxation will be devastating, the parties' stipulation shows otherwise. That stipulation states that in 1987, only $10,718.75 in state and local ad valorem taxes were levied against the Yakima Nation. Although the taxes levied against individual Indians are not set out, based on the assessed valuation of the land, they likewise are not very substantial. J.A. 36-37. By contrast, the United States contributes substantial funds to the school districts on the Reservation: $871,102 to the Mt. Adams School District, $2,859 to the Union Gap School District, $1,232,205 to the Wapato School District, $705,204 to the Toppenish School District and $238,706 to the Granger School District. J.A. 41-42.[27] While the

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U.S.C. 1151. Furthermore, at the time *Capoeman* was decided, there was substantial uncertainty about the taxability of non-trust property owned by Indians within the boundaries of a reservation. *Itasca County*, 426 U.S. at 391 ("[there was] a general uncertainty in 1953 of the precise limits of state power to tax reservation Indians respecting other than their trust property"); see also 426 U.S. at 392 n.16.

[27] The United States contributes substantial sums for the benefit of Indians on a nationwide bases. For fiscal year 1991, appropriations for programs authorized principally by the Snyder Act, 25 U.S.C. 13, totaled $1,326,997,000 for the Bureau of Indian Affairs, and $1,418,600,000 for the Indian Health Service (with an additional $167,279,000 for IHS facilities). Pub. L. No. 101-512, 104 Stat. 1929, 1950-1951. Moreover, we have been informed by the

County's loss as a result of being unable to tax Indian-owed fee within the Reservation lands is relatively insignificant, the potential harm to Indian Tribes is great "if they might raise revenue only after the tax base had been filtered through many governmental layers of taxation." *Itasca County*, 426 U.S. at 388-389 n.14. It is, of course, for Congress ultimately to balance the needs and equities, and to determine whether state taxation should be authorized.

Even if the applicable statutory framework here were ambiguous, the courts "are not obligated in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship." *Itasca County*, 426 U.S. at 388-389 n.14. But however that may be, as we have explained, the Court in fact has already held that Section 6 of the General Allotment Act, on which the County rests its entire case, does *not* have the present effect of authorizing state taxation of reservation Indians, in light of the intervening enactment of the IRA, modern jurisdictional statutes, and numerous measures designed to further tribal self-government and economic development.[28]

Department of the Interior that $430,000,000 in funding for housing and related programs were made available through the Department of Housing and Urban development, and that $24,931,000 were appropriated under the Johnson-O'Malley Act, 25 U.S.C. 452 *et seq.*, for contracts with local school districts to provide supplemental educational services for Indian children. The latter funds are in addition to impact aid for local school districts (such as that itemized in the text) under Pub. L. No. 81-874, 64 Stat. 1106, 20 U.S.C. 240(b)(3)(D)-(E).

[28] The County also challenges (Br. 36-37) the court of appeals' holding that it may not levy an excise tax on the sale of land owned by the Yakima Nation or one of its members on the Reservation, because that tax has not been authorized by Congress. But the County admits (Br. 36) that the tax is imposed on the seller, and it does not point to any statute in which Congress has expressly authorized such taxation. The holding below therefore represents a routine application of the settled principle that in the absence of

CONCLUSION

The judgment of the court of appeals should be vacated insofar as it concerns the ad valorem tax, and the case should be remanded with instructions to affirm the judgment of the district court on that issue. The judgment of the court of appeals should be affirmed insofar as it concerns the excise tax (see note 28, *supra*).

Respectfully submitted.

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express congressional authorization, the States may not tax an Indian with respect to his on-reservation transactions. The County suggests that an excise tax on land is akin to a state tax on cigarettes sold by Indians to non-Indians, which *Moe*, *Colville* and *Potawatomi* have required a tribe or tribal member to collect. In those cases, however, the incidence of the tax was on the non-Indian purchaser, and the Court relied on the fact that the Indians were essentially selling their tax exemption and assisting non-members to evade a duty to pay. See *Moe*, 463 U.S. at 481-483. Plainly no such considerations apply here.

APPENDIX

Section 6 of the General Allotment Act of 1887, Act of Feb. 8, 1887, ch. 119, 24 Stat. 390, as amended by the Act of May 8, 1906, ch. 2348, 34 Stat. 182, and as codified at 25 U.S.C. 349, provides:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: *And Provided further*, That the provisions of this Act shall not extend to any Indians in the former Indian Territory.

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